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## Community and Separate Property Interests in Life Insurance Proceeds: The Risk Payment Doctrine in State Courts and Its Federal Estate Tax Consequences

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## COMMUNITY AND SEPARATE PROPERTY INTERESTS IN LIFE INSURANCE PROCEEDS: THE RISK PAYMENT DOCTRINE IN STATE COURTS AND ITS FEDERAL ESTATE TAX CONSEQUENCES

The problem of characterization of life insurance proceeds as separate or community property when both separate and community funds have been used to pay premiums has plagued courts in community property jurisdictions<sup>1</sup> for over a century. Under the apportionment doctrine, which was first applied in 1875,<sup>2</sup> policy proceeds are characterized as separate and community in proportion to the amount of premiums paid from separate funds and the amount of premiums paid from community funds. Under the inception of title doctrine, in use since 1886,<sup>3</sup> policy proceeds are characterized as separate or community depending on the character of the funds that were used to pay the first premium. Neither of these two rules should be applied to term life insurance, however, for term insurance has no cash value and is essentially renewed with each premium payment.<sup>4</sup> Thus the risk payment

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1. The following states comprise the American community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

2. Estate of Webb, Myr. Prob. 93 (Cal. 1875). In *Webb* one annual premium on a cash value policy had been paid from the insured's separate funds before marriage and two annual premiums had been paid from community funds after marriage. The policy beneficiary was the insured's estate. Upon the insured's death, the court divided the proceeds of the policy, finding one-third to be separate property and two-thirds community property. For a discussion of *Webb* see this author's previous Comment, *Community and Separate Property Interests in Life Insurance Proceeds: A Fresh Look*, 51 WASH. L. REV. 351, 366-67, 387-88 (1976).

Courts of California and Washington have accepted the apportionment rule for use with all types of life insurance policies and have made no distinction between cash value and term policies. See notes 78-86 and accompanying text *infra*. A cash value policy accumulates a cash surrender value or equity which can be borrowed against by the policyowner or which can be received by him if he cancels his policy. A term insurance policy accumulates little or no cash value. See Parts I & III *infra*.

3. *In re Moseman*, 38 La. Ann. 219 (1886). In *Moseman*, life insurance policy premiums were paid from separate funds before marriage and from community funds during marriage. The policy beneficiary was the insured's estate. After the insured husband's death, the Louisiana Supreme Court held that the policy proceeds were the separate property of the insured. For a discussion of *Moseman*, see Comment, *supra* note 2, at 356-59, 387-88.

The courts of Louisiana, Texas, Arizona, and New Mexico apply the inception of title doctrine to cash value policies and, to varying degrees, have accepted the risk payment doctrine for use with term insurance. See Part II *infra*.

4. See Part I *infra*.

doctrine<sup>5</sup> has recently been developed<sup>6</sup> in order to deal with situations in which both separate and community funds have been the source of premiums on a term life insurance policy. The risk payment doctrine characterizes term insurance proceeds as separate or community according to the source of the last premium payment.

This comment will first examine the decisions of the Louisiana, Texas, Arizona, Idaho, and New Mexico courts<sup>7</sup> in which the risk payment doctrine has been approved for use with term insurance in order to determine how well established the doctrine is in each state. The status of the risk payment doctrine in state courts is important because "state property rules control the estate taxation of community property life insurance."<sup>8</sup> The estate tax consequences of the risk payment doctrine will then be considered.

## I. THE RISK PAYMENT DOCTRINE AND ITS APPLICATION TO TERM INSURANCE: AN INTRODUCTION

Term life insurance has little or no cash value.<sup>9</sup> It is a unique type of property,<sup>10</sup> the most important feature being that it exists only by virtue of each advance premium payment. Protection for the coming year depends exclusively upon payment of this advance premium. The length of time the insured has had the policy and the number of premiums previously paid are irrelevant.<sup>11</sup> If the term passes without the insured's death, the protection purchased expires without loss. The insured has had the benefit of protection for the year and the protec-

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5. The term "risk payment doctrine" is derived from the concept that life insurance proceeds should be characterized according to the source of funds which paid for the risk portion of a life insurance policy which is in effect at the insured's death. The risk portion of a policy is the face value (amount which will be paid upon the insured's death) minus the cash value, if any. For a complete discussion of the risk payment doctrine, see Comment, *supra* note 2, at 372-88.

6. See *Phillips v. Wellborn*, 552 P.2d 471 (N.M. 1976); *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975); *Lock v. Lock*, 8 Ariz. App. 138, 444 P.2d 163 (1968); *Gaethje v. Gaethje*, 7 Ariz. App. 544, 441 P.2d 579 (1968); *Sherman v. Roe*, 153 Tex. 1, 262 S.W. 2d 393 (1953); *Easterling v. Succession of Lamkin*, 211 La. 1089, 31 So. 2d 220 (1947) (dictum). See also Part II *infra*.

7. See cases cited in note 6 *supra*.

8. *Scott v. Commissioner*, 374 F.2d 154, 157 (9th Cir. 1967), quoting *Thurman. Federal Estate and Gift Taxation of Community Property Life Insurance*, 9 STAN. L. REV. 239, 245 (1957).

9. See Comment, *supra* note 2, at 383 n.124.

10. See *id.* at 352-53.

11. Concerning the right to keep the policy in force after the insured has become uninsurable, see *id.*, *supra* note 2, at 369-72.

tion has been "used up." He must pay another advance premium to enjoy further protection.

As applied to term insurance, the risk payment doctrine states that the life insurance proceeds are characterized as separate or community according to the source of the last premium payment.<sup>12</sup> Thus, if the community is paying for insurance protection at the time the insured dies, the insurance proceeds should be characterized as entirely community property. This rule is consistent with the unique aspect of term insurance that the current protection is entirely dependent upon the last premium payment. Premium payments in years gone by are not considered important. This is in contrast to the necessity of knowing the sources of past years' premium payments before applying the inception of title and apportionment rules.

## II. THE RISK PAYMENT DOCTRINE AS APPLIED TO TERM INSURANCE IN STATE COURTS

### A. Louisiana

The Louisiana Supreme Court was the first state court to apply the inception of title rule to cash value life insurance in the 1886 case of *In re Moseman*.<sup>13</sup> The Louisiana Supreme Court was also the first court to accept the risk payment doctrine, which was applied to disability insurance in *Easterling v. Succession of Lamkin*<sup>14</sup> in 1947. Dictum in *Easterling* indicated that the court considered the risk payment doctrine to be the most appropriate method for dealing with term life insurance.

In *Easterling*, the insured husband bought four cash value life insurance policies containing disability benefit provisions<sup>15</sup> before his marriage in 1930. The portion of the policy premium which was charged for the disability benefit was stated in each policy. The insured became disabled in 1939 and died in 1944. His claim for disa-

12. See *id.* at 372-81.

13. 38 La. Ann. 219 (1886).

14. 211 La. 1089, 31 So. 2d 220 (1947).

15. The disability income benefit of each policy provided that if the insured became permanently disabled before the age of 60, he would receive a certain monthly sum for the length of his disability. 31 So. 2d at 221. Disability income insurance is often sold as a "rider" to a life insurance policy. But because it is a type of health insurance, it is properly analyzed as a distinct product. J. BELTH, LIFE INSURANCE: A CONSUMERS' HANDBOOK 30 (1973); 15 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 53:3 (2d ed. 1966).

bility benefits was not allowed during his life but was settled after the insured's death. The wife was the beneficiary of the life insurance death proceeds of all four policies and the beneficiary of disability benefits due but unpaid at the decedent's death under two of the policies. The other two policies had no provision concerning who was entitled to accrued but unpaid disability benefits at the insured's death. Thus the disability benefits payable under these policies were payable to the decedent's estate.

The insured's brother and sister argued that the portion of disability benefits payable to the insured's estate should be characterized as the insured's separate property,<sup>16</sup> citing previous Louisiana cases in which the inception of title rule was applied to life insurance policies taken out before marriage. The surviving spouse argued that the proceeds were community property.<sup>17</sup> The trial court held for the widow and the Louisiana Supreme Court affirmed.

The supreme court reasoned that the disability benefits did not fit into the statutory definition of separate property because the proceeds were neither brought into the marriage, acquired during the marriage with separate funds nor acquired by gift or inheritance.<sup>18</sup> Thus the proceeds were characterized as community property because of the statutory definition of community property as that which is not separate property.<sup>19</sup> Most significantly, the court refused to follow the previous cases in which it had applied the inception of title rule because it reasoned that disability insurance, which it analogized to term insurance, has no value until the happening of the contingency insured against.<sup>20</sup> This application of the risk payment doctrine to disability

16. If the disability proceeds were characterized as separate property, the brother and sister would have received them under the Louisiana statutes of intestate succession. LA. CIV. CODE ANN. art. 912 (West 1972).

17. If the disability benefits were characterized as community property they would belong to the wife because (1) she owned a half-interest in any community property, and (2) an intestacy statute provided that a deceased spouse's community interest passes to the surviving spouse. *Id.* art. 915.

18. The pertinent parts of the statute read:

The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

...

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared.

*Id.* art 2334.

19. *Id.*

20. The court stated:

Those decisions have reference only to life insurance. They are not applicable

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insurance and the Louisiana Supreme Court's perception of disability and term life insurance as analogous<sup>21</sup> indicate that in Louisiana the risk payment doctrine should apply to term insurance as well as to disability insurance.<sup>22</sup>

Neither before nor after *Easterling* have Louisiana appellate courts been called upon to determine the character of term policy proceeds when premium payments have been made from both separate and community funds and the insured's estate is the designated beneficiary.<sup>23</sup> In *Succession of Mendoza*,<sup>24</sup> an intermediate appellate court

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to disability insurance. Life insurance, *other than term insurance*, has a certain value during the lifetime of the insured. On the other hand, disability insurance, *like term insurance*, has no reserve or cash surrender value, or other actual value before the happening of the event on which the insurance is payable. In this case, for example, that part of the premiums which was attributable to the disability benefits, and which the insured paid previous to his marriage, added nothing to his estate because the event on which the disability benefits depended did not happen previous to the marriage. In that respect he did not bring anything of value into the marriage.

We concede of course that the taking out of the disability insurance previous to the marriage, instead of taking it out after the marriage, was of some advantage to the community. . . . But we do not consider these advantages which the community received by reason of the taking out of the insurance previous to the marriage of the insured sufficient to justify our holding that the fund in contest is an asset of the separate estate of the insured and not an asset of the community.

31 So. 2d at 223 (emphasis added).

21. Term life insurance and disability income insurance are very similar. In fact, health insurance, including disability income insurance, is a type of term insurance, for the health insurance policy is generally a contract for a specific term. After the expiration of the term, the insured may or may not be able to renew the policy, depending on the policy provisions. H. DENENBERG, R. EILERS, J. MELONE & R. ZELTEN, *RISK AND INSURANCE* 311-12 (2d ed. 1974) [hereinafter cited as DENENBERG]; O. D. DICKERSON, *HEALTH INSURANCE* 425-26, 446-48, 491-93 (3d ed. 1968); C. ELLIOTT & E. VAUGHAN, *FUNDAMENTALS OF RISK AND INSURANCE* 263, 277-78 (1972); S. HUEBNER & K. BLACK, *LIFE INSURANCE* 240-41, 546-47 (7th ed. 1969). Furthermore, "[g]roup disability income insurance has all the characteristics of the group term life insurance." DENENBERG, *supra* at 311-12. One author's description of a group disability policy also applies to term life insurance. "Such protection is peculiarly designed to meet future needs, is essentially 'instantaneously' available by reason of current employment [or current premium payments], and [is] not acquired over a time span." Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 758-59 n.135 (1974).

22. The court also used an alternate line of reasoning in reaching the conclusion that the proceeds were community property. It reasoned that the disability benefits were community property because they were "compensation for the loss of the earning capacity of the insured." 31 So. 2d at 224. The supreme court clearly stated, however, that the first line of reasoning, which relied on the statutory definition of separate and community property alone, was sufficient to justify the holding. *Id.*

23. Under Louisiana law, if the insured's estate is not the beneficiary then the insurance proceeds belong solely to the named beneficiary. See, e.g., T.L. James & Co. v. Montgomery, 332 So. 2d 834, 847 (La. 1975). In this case the beneficiary of a group term life insurance policy was a son by the deceased husband's first marriage. Policy premiums had been paid from both pre- and post-second marriage funds. The court held that the policy proceeds were the property of the beneficiary and the community's interest was limited to reimbursement for the increase in the policy's cash value due to

did apply the inception of title rule to the proceeds of an employer-provided death benefit plan which, in some respects, is analogous to group term life insurance. The Louisiana Supreme Court recently overruled *Mendoza*, however, holding that the apportionment rather than the inception of title rule should be applied in determining the character of employer-provided death benefits which are not insurance contracts.<sup>25</sup> Thus *Easterling* remains the most authoritative case and indicates that Louisiana would apply the risk payment doctrine to term insurance as it already does to disability insurance.

There is one community property principle that has recently been applied to life insurance in Louisiana that adds support to the *Easterling* dictum concerning the use of the risk payment doctrine with term insurance. This principle is that of Louisiana Civil Code Article 2408<sup>26</sup> which provides that when the separate property of a spouse has been increased or improved during marriage, the other spouse is entitled to one-half the value of the increase if such increase is the result of community expenditures. The Louisiana Supreme Court recently applied this rule to life insurance and held that when community funds are used to pay premiums on a separate policy, the community is entitled to be reimbursed for the enhancement in the policy's value (defined by the court as the cash surrender value) resulting from premium payments made with community funds.<sup>27</sup> The Louisiana courts should recognize that the principle of Article 2408 is also applicable when the community has paid the last term insurance premium before death. In that case the proceeds should be community property

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community premium payments. Because a term policy was involved there was no increase in cash value and therefore the community had no interest in the policy proceeds. See also *Berry v. Metropolitan Life Ins. Co.*, 327 So. 2d 521 (La. App. 1976), in which the court denied the wife any interest in the proceeds of a group term life insurance policy because the insured husband's sister was the beneficiary. All policy premiums had been paid from community funds.

For federal estate and gift tax purposes, however, proceeds of a policy on which all premiums have been paid from community funds are deemed to be community property regardless of who is named as beneficiary. Rev. Rul. 48, 1953-1 CUM. BULL. 392, 394; Rev. Rul. 232, 1953-2 CUM. BULL. 268, 270 Example (A)(1). Similarly, upon the authority of *Easterling*, for federal estate and gift tax purposes term life insurance proceeds in Louisiana should be characterized as community property regardless of who is named as beneficiary if community funds provided the last premium payment.

24. 288 So. 2d 673 (La. App. 1974).

25. See *T.L. James & Co. v. Montgomery*, 332 So. 2d 834, 853 n.4 (La. 1976) (opinion on rehearing).

26. LA. CIV. CODE ANN. art. 2408 (West 1972).

27. *T.L. James & Co. v. Montgomery*, 332 So. 2d 834, 847 (La. 1975); *Connell v. Connell*, 331 So. 2d 4, 6-7 (La. 1976).

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because the community expenditure has resulted in an increase in the policy's value from nothing before death to the full face value after death.

### B. Texas

It appears that the Texas Supreme Court accepted the risk payment doctrine in the 1953 case of *Sherman v. Roe*.<sup>28</sup> In that case, the husband was issued a certificate of insurance under his employer's master group accidental death policy during his first marriage and the wife of the earlier marriage had been designated beneficiary. That marriage was subsequently dissolved and the husband married again. Ten years after the policy was first issued, three years after the date of his second marriage, and one year before the husband's death, the face amount of the policy was increased from \$2,000 to \$9,000. After having paid premiums on the insurance policy for approximately six and one-half years with pre-second-marriage funds and four and one-half years with community funds, the husband and his second wife were killed in an aircraft accident. As a result of the accident, it was impossible to prove whether the death of the husband and wife had been simultaneous. The wife was the designated beneficiary of the policy proceeds. Because the Texas Simultaneous Death Act<sup>29</sup> had not yet become effective as of the date of the accident, there was no presumption either of survivorship or of simultaneous death. The Texas Supreme Court, in reversing the appellate court,<sup>30</sup> held that the policy proceeds were community property. This resulted in the administrator of the estate of each deceased spouse receiving one-half of the policy proceeds.

In reaching its conclusion that the proceeds of the policy were community property rather than separate property, the court reasoned as follows:<sup>31</sup>

[T]he insurance was maintained by [community] payments and by

28. 153 Tex. 1, 262 S.W.2d 393 (1953).

29. Originally enacted in ch. 196, [1951] Tex. Laws 322, the current statute is found in TEX. PROB. CODE § 47 (Supp. 1975-76).

30. *Sherman v. Roe*, 258 S.W.2d 862 (Tex. Civ. App. 1953). The lower court had held that the proceeds were the separate property of the husband because the policy provided that the proceeds were payable to the wife only "if surviving the Employee [husband], and otherwise to the estate of the Employee [husband]." 258 S.W.2d at 864.

31. 262 S.W.2d at 397.



[the husband's] continuing to work as employee of the company insured by the group policy. The greater part of the insurance was procured after [the husband and wife] were married. Whatever rights to the proceeds of the insurance might accrue to [the husband] as his separate property on account of his having procured the insurance for \$2,000 before his marriage to [the wife] or by his payments of premiums before his marriage to her in our opinion passed to the community when, after his marriage to [her], he paid the premiums out of community funds, made her the beneficiary, and increased the amount of the insurance to \$9,000. Under this state of facts the ownership of the proceeds of the certificate is to be determined in the same way as if the certificate had been issued after [the husband and wife] were married and all premiums paid out of community funds.

The first factor considered by the court, that the insurance policy was maintained by community payments after marriage, is the most important and indicates that the Texas Supreme Court applied the risk payment doctrine. The court reasoned that the premium payments of \$42.15 (46% of the total premiums paid) over the six and one-half years previous to marriage (65% of the time the policy was in force) did not create any vested right to policy proceeds in the husband's separate estate. Such pre-marriage premium payments had no effect on whether the policy would be in force during the marriage, for if payments had not been continued during marriage, the insurance protection would have expired. Thus the insurance proceeds were attributable not to any separate premium payments but rather to community payments made during the second marriage.

The remaining two factors the court relied on are less significant and can be dismissed. Because the policy's face amount was increased from \$2,000 to \$9,000 after three years of marriage and one year before death, the court reasoned that the "greater part" of the insurance proceeds were acquired after marriage and therefore the entire proceeds should be community property. It is unclear how such a "greater part" test can be applied in future cases. There is no indication how much of an increase must occur before the increase can be labeled a "greater part" of the proceeds. Furthermore, this reasoning is weak because the court treated the \$2,000 as negligible. Two-ninths (22%) of the proceeds of a policy, however, is not a negligible amount.<sup>32</sup>

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32. It is common for group term life insurance protection to increase as an employee

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The final factor considered important by the court was that the beneficiary of the life insurance policy was the wife. It is difficult to understand, however, that making the wife the beneficiary would lend any support to the contention that the proceeds were community property, for just the opposite conclusion is required by Texas law. "[I]t has been rather thoroughly established in Texas . . . that the proceeds of a policy on the husband's life payable to the wife as beneficiary upon the death of the insured belong to the wife as her separate property."<sup>33</sup>

After concluding that the ownership of the proceeds should be determined as if the insurance had been issued after marriage and all premiums paid from community funds, the court used two alternative lines of reasoning to conclude that half the proceeds should belong to each spouse's estate. First, the statutory presumption, that upon dissolution of the community all effects of the husband and wife are community property, could not be rebutted because it was impossible to determine in what order the deaths occurred. Thus the court reasoned that "the proceeds . . . should, by reason of the statute . . . , be deemed community effects."<sup>34</sup> As an alternative to the use of the statutory presumption, the court said that even if the proceeds were payable to the husband's separate estate, the proceeds would still be community property.<sup>35</sup> This reasoning was based on the rule that if the beneficiary of a community property life insurance policy is the insured spouse's estate, the proceeds are community property.<sup>36</sup> Professor Huie and other commentators have suggested that the case indicates that the Texas Supreme Court has accepted the risk payment rule.<sup>37</sup>

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gains seniority and as his salary increases. Additional examples of group term life insurance coverage increasing over the years can be found in the following cases: *Berry v. Metropolitan Life Insurance Co.*, 327 So. 2d 521, 522 (La. App. 1976) (group term life insurance increased from \$33,000 to \$49,500); *T.L. James & Co. v. Montgomery*, 332 So. 2d 834, 847 (La. 1975) (group term life insurance increased from \$15,000 to \$22,500); *Lock v. Lock*, 8 Ariz. App. 138, 444 P.2d 163, 165 (1968) (group term life insurance increased from \$12,500 to \$17,500); *Polk v. Polk*, 228 Cal. App. 2d 763, 39 Cal. Rptr. 824, 827 (1964) (group term life insurance increased from \$3,300 to \$6,500).

33. *Warthan v. Haynes*, 155 Tex. 413, 288 S.W.2d 481, 484 (1956).

34. 262 S.W.2d at 397.

35. *Id.* at 398-99.

36. *Id.*

37. Professor Huie stated:

When term insurance is being renewed periodically, the transaction can properly be analyzed as the formation of a new contract as each renewal occurs. If that was the case in *Sherman v. Roe*, as it seems to have been, the court was entirely

Ten years after *Sherman v. Roe*, another significant Texas life insurance case, *McCurdy v. McCurdy*,<sup>38</sup> was decided. In *McCurdy*, the deceased husband had paid premiums on two life insurance policies for several years before marriage and one and one-half years after marriage until his death. His estate was the beneficiary under each policy. One policy had been "converted" a month before the insured's death, but the nature of the conversion was not indicated. The husband's executor listed the proceeds as part of the husband's separate estate and the wife brought an action against the executor seeking a determination of the character of the proceeds. The appellate court affirmed the trial court's holding that the proceeds should be characterized as separate property and that the community was entitled to a reimbursement, without interest, of the premiums it had paid. *McCurdy* was approved by the Texas Supreme Court's refusing a writ of error to the lower court.

In light of the *Sherman* and *McCurdy* opinions, the rules for determination of separate and community interest in life insurance policies in Texas seem to be clear. The court in *Sherman* said that if the policy is a term policy, then the character of the proceeds is to be determined by the source of the funds (community or separate) from which the last premiums came, where such premiums are responsible for the insurance being in force at the decedent's death. Although the court in the *McCurdy* case did not designate precisely what type of life insurance policies was before it, it is assumed that they were of a type which built cash value, or the court would have felt constrained to follow *Sherman*.<sup>39</sup> Therefore, for cash value policies in Texas, the rule governing the characterization of life insurance proceeds when both separate and community funds have paid policy premiums appears to be the inception of title rule.<sup>40</sup>

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justified in treating the contract in controversy as one that was formed during the . . . marriage and paid for entirely with . . . community funds.

Huie, *Community Property and Life Insurance—Substantive Aspects—Developments in Texas*, 2 TEXAS INST. 104, 128 (1957). See also S. SCOVILLE, *COMMUNITY PROPERTY RIGHTS IN LIFE INSURANCE* 103 (1969); Note, 18 Sw. L.J. 521 n.2 (1964); Note, 42 TEXAS L. REV. 747, 750 & n.24 (1964).

38. 372 S.W.2d 381 (Tex. Civ. App. 1963, writ ref'd).

39. Since *Sherman* no Texas appellate court has faced the question of how to characterize proceeds of a term life insurance policy when premiums have been paid from both separate and community funds and the beneficiary is the insured's estate. Since *McCurdy* the same question regarding cash value insurance has arisen only once. See *Pritchard v. Snow*, 530 S.W.2d 889 (Tex. Civ. App. 1975). The *Pritchard* court followed the *McCurdy* holding.

40. Although the risk payment doctrine or the inception of title rule may charac-

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### C. Arizona

Although the Arizona Supreme Court adopted the inception of title rule for cash value policies in 1939,<sup>41</sup> the Arizona Court of Appeals explicitly accepted the risk payment doctrine for term insurance in two 1968 cases. In *Gaethje v. Gaethje*,<sup>42</sup> the husband was issued a certificate of insurance under his employer's group term life insurance policy in 1947 during his second marriage. Presumably the premiums for the policy were paid monthly. In 1952 he divorced his second wife and then remarried her in 1953. After the remarriage, the insured changed the policy beneficiary from his wife to his son. The divorce decree contained no reference to the policy. The husband died in 1966 while married to his second wife and covered by the policy.

The widow instituted an action against the beneficiary to recover the policy proceeds, alleging that the decedent's change of beneficiary from the widow to the son was an invalid transfer of community property beyond the scope of the husband's authority without his wife's consent. The trial court granted summary judgment in favor of the widow, holding that a gift of community property life insurance policy proceeds through a beneficiary designation was entirely void as to the community's interest in the policy if the wife had not consented to the beneficiary designation. That community interest was determined by application of the apportionment rule to be approximately 97% of the proceeds, or about \$5,800.

On appeal the Arizona Court of Appeals reversed the trial court,

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terize policy proceeds as community property, the surviving spouse will not necessarily share in the proceeds. If the beneficiary of a life insurance policy is a third party, such as a child, parent or friend, the surviving spouse cannot void the beneficiary designation as to her one-half interest in community property proceeds unless such designation is an act of either actual or constructive fraud. Factors to be considered in determining whether the beneficiary designation is constructively fraudulent are "the relationship of the parties, whether special circumstances tended to justify the gift, and whether the community funds used for such purpose were reasonably in proportion to the community assets remaining." *Givens v. Girard Life Ins. Co. of America*, 480 S.W.2d 421, 426 (Tex. Civ. App. 1972, *writ ref'd, n.r.e.*). A prima facie case of constructive fraud is presented if "life insurance was purchased with community funds for the benefit of an unrelated person." *Id.* In considering whether the gift of community funds is reasonable in proportion to the amount of community assets retained by the surviving spouse, courts emphasize the amount of insurance proceeds rather than the amount of premiums which resulted in those proceeds. *See, e.g., Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278, 282 (Tex. Civ. App. 1973, *writ ref'd, n.r.e.*) *See generally* *Great Am. Reserve Ins. Co. v. Sanders*, 525 S.W.2d 956 (Tex. 1975).

41. *Rothman v. Rumbeck*, 54 Ariz. 443, 96 P.2d 755 (1939) (premiums paid from separate funds before marriage and community funds after marriage).

42. 7 Ariz. App. 544, 441 P.2d 579 (1968).

holding that the uncorroborated affidavit of the wife which stated that she had not consented to the beneficiary designation was insufficient to overcome the statutory presumption that she had consented to such designation. Therefore, granting a summary judgment in the wife's favor on the basis of the affidavit alone was improper.

After explaining the circumstances under which the husband may make a valid gift of community insurance proceeds to a third party,<sup>43</sup> the court clarified the law concerning the interest of the community in the policy when community premium payments had followed separate premium payments. First, the court noted that term life insurance policies were unique and had no value until the death of the insured. It then refused to apply the precedent of *Rothman v. Rumbeck*,<sup>44</sup> the 1939 case in which the Arizona Supreme Court adopted the inception of title rule. *Rothman* was distinguished by the *Gaethje* court because it presumably involved a cash value life insurance policy rather than term life insurance.<sup>45</sup> Finally, as a result of the unique character of term insurance, the court felt it did not have to deal with the status of the policy after the divorce:<sup>46</sup>

Community funds paid for *all* of the coverage that resulted in these particular proceeds. The fact that the husband's separate estate paid a premium for a risk long since expired without loss should not give his separate estate any vested interest in these proceeds.

*Gaethje* is significant because the Arizona appellate court, unlike the Texas Supreme Court in *Sherman v. Roe* 15 years earlier, relied exclusively on the unique character of term life insurance to justify treating it differently than cash value insurance. It should also be noted that the Arizona court did not need to accept the risk payment doctrine in this case; the application of the inception of title rule, which was already the established doctrine in the state, would have led to the same conclusion, *i.e.*, that the proceeds were community property because the first policy premiums were paid with community funds before the divorce.

43. The court adopted the view that if the wife were left with as much in value as one-half of the total community property upon the husband's death, then the "gift" by the husband's designation of a third party as the beneficiary of a community life insurance policy was valid. Otherwise, there would be constructive fraud upon the wife and the designation would be ineffective to the extent of such constructive fraud. 441 P.2d at 584.

44. 54 Ariz. 443, 96 P.2d 755 (1939).

45. See Part III *infra* for further discussion of cash value life insurance.

46. 441 P.2d at 585 (emphasis in original).

Two months after the *Gaethje* decision, the Arizona Court of Appeals again explicitly relied on the risk payment doctrine in *Lock v. Lock*.<sup>47</sup> In this case, the husband began paying premiums on a group term life insurance policy with community funds during his first marriage. In 1961 the husband and his wife were divorced. The property settlement accompanying the divorce provided that the husband maintain insurance on himself and that the proceeds of such insurance be placed in an irrevocable trust for the benefit of the children. Soon after the divorce the husband married his second wife and in 1962 he changed the beneficiary of his group term policy to his second wife and let another of his policies lapse. He died in 1963. His first wife sued on behalf of herself and her minor children to recover the amount of proceeds which according to the terms of the property settlement agreement should have been deposited into the trust upon the husband's death. The first wife and her children unsuccessfully advanced several arguments to sustain their right to recovery. One argument was that because the group term life insurance policy was owned by the community of the husband and his first wife during their marriage, it continued to be owned by them as tenants in common after their divorce; thus, the husband should be unable to designate a third party as the policy beneficiary without the consent of his first wife. The court rejected this argument, however, and, quoting *Gaethje*, reasoned that "the premiums paid which resulted in this policy being in effect on the date of [the husband's] death were not paid from community funds as they were paid after the divorce."<sup>48</sup>

*Lock* firmly establishes that the Arizona courts have accepted the risk payment doctrine. The fact that the court ruled directly against the luckless wife and her three minor children indicates the strength of the risk payment doctrine in Arizona. Apparently, however, the inception of title rule still governs the characterization of cash value policy proceeds in Arizona, for recently the Arizona Court of Appeals followed the *Rothman* inception of title rule in a situation dealing with a cash value insurance policy.<sup>49</sup>

47. 8 Ariz. App. 138, 444 P.2d 163 (1968).

48. 444 P.2d at 169.

49. *Everson v. Everson*, 24 Ariz. App. 239, 537 P.2d 624, 628-29 (1975) (cash value policy "purchased" before marriage is husband's separate property), citing *Perry v. Perry*, 18 Ariz. App. 299, 300, 501 P.2d 568, 569 (1972).

*D. Idaho*

The Idaho Supreme Court recently adopted the risk payment doctrine for use with term insurance in *Travelers Insurance Co. v. Johnson*.<sup>50</sup> In this case, after the husband and his first wife were divorced, the husband received a group term life insurance policy as an incident of his employment and named his ex-wife as beneficiary of the policy. The first nine months' premiums were paid from his separate funds before his second marriage. He then married his second wife, paid premiums on the policy with community funds for ten and one-half years, and died. Upon the insured's death, both the insured's ex-wife, who was the named beneficiary, and his widow claimed the \$10,000 policy proceeds.

The facts before the trial court were stipulated, including the fact that although the widow was aware of the insurance policy, she had had the impression that she was the policy's beneficiary, and therefore had not consented to community premium payments for a policy which named a third party as beneficiary. The trial court apportioned the proceeds between the two women in a unique manner based on the amount of time each had had an insurable interest in the decedent.

Before the Idaho Supreme Court, however, neither woman argued in favor of the trial court's result. The ex-wife, who was the beneficiary under the policy, argued that the inception of title rule should govern and therefore the proceeds should be characterized as separate property with the widow's interest limited to recovery of only one-half the community premiums paid. The widow argued that because premium payments had been made from community funds the community obtained "vested" rights in the proceeds. This is the rationale behind the apportionment doctrine.<sup>51</sup> Alternatively, the widow argued that she was entitled to one-half the policy proceeds.

After considering both the policy questions and the legal questions, the court rejected the rationales behind both the inception of title and the apportionment rules. The court recognized that "[t]he policy implications of this case present problems of great conceptual difficulty"<sup>52</sup> and that their resolution required determining the extent to

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50. 97 Idaho 336, 544 P.2d 294 (1975).

51. See note 2 and accompanying text *supra*.

52. 544 P.2d at 296.

which term insurance should be controlled by the contractual terms of the insurance policy rather than by community property law.

The court found two dominant policy concerns which arise out of this attempt at balancing the policy's contractual terms with community property law. The first concern is the protection of the surviving spouse from the decedent's dissipation of all the community property through the medium of life insurance. The second concern involves the wish of a married insured to utilize life insurance to provide for dependent relatives other than his or her spouse. As a policy matter, the court was unwilling to resolve the conflict between these two interests by favoring one over the other. Therefore, on policy grounds the court rejected the inception of title rule, which would have allowed the decedent husband in this instance to have given all of the life insurance proceeds to a third person, stating: "Convenient as this proposition may appear, it all but avoids the central policy considerations."<sup>53</sup>

Similarly, the court refused to accept Washington's apportionment rule<sup>54</sup> because to do so would mean that if the insured spouse names a third party as the beneficiary of a community property life insurance policy without permission of the noninsured spouse, the noninsured spouse could prevent the transfer of *any* funds to the beneficiary. In comparison the California apportionment rule,<sup>55</sup> which does allow the transfer of one-half the community interest to the named beneficiary, more closely follows a rationale which balances both policy concerns.

The court also addressed two legal questions. The first concerned the interest which a community acquires in a term life insurance policy by virtue of premium payments being made from community funds. The court rejected the inception of title rule because it "leaves unanswered the question of what interest results from the use of community assets to pay the premiums."<sup>56</sup> The reasoning behind the apportionment rule, that through premium payments made from community funds the community obtains a vested right in the proceeds, was also explicitly rejected.<sup>57</sup> The court reasoned that no vested interest in term insurance policy proceeds arises by virtue of community

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53. *Id.*

54. *See* note 103 *infra*.

55. *Id.*

56. 544 P.2d at 296.

57. *Id.* at 296-97.



premium payments because after discontinuing such payments there is nothing remaining in which the "vested right" can claim an interest.<sup>58</sup> Similarly, there is nothing in which to claim an interest if the spouses divorce because the policy has value only upon the insured's death. Therefore the court held that at the death of the insured the proceeds were community property.<sup>59</sup>

The second legal question addressed by the court concerned the extent to which an insured spouse can make a valid gift of community property life insurance proceeds through a beneficiary designation to a third party without the consent of the noninsured spouse. The court reviewed the laws of Louisiana, Washington, California, and Texas concerning the gifts of community property life insurance proceeds. It then discussed the earlier Idaho case of *Anderson v. Idaho Mutual Benefit Association*.<sup>60</sup> In *Anderson* it was stated that an insured spouse cannot make a valid gift of insurance proceeds through a beneficiary designation on a community life insurance policy without the noninsured spouse's consent. The court also stated that if such a gift were made, it was voidable by the noninsured spouse as to his or her one-half interest in the proceeds. Relying on *Anderson*, the court held that if the insured spouse names a beneficiary other than the noninsured spouse, and if the noninsured spouse has not consented to such a beneficiary designation, then the noninsured spouse can recover half of the community policy proceeds.<sup>61</sup>

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58. See Comment, *supra* note 2, at 373-74 & n.97.

59. The court stated:

Since the policy in the case at bar is a term life insurance policy, we need not determine if a property interest in that policy "vested" at the time of issuance or at the time when premiums were paid from community funds. As a term policy it had no value except in the event of the death of the insured. It is enough to hold that at the death of the insured a community property interest in the proceeds became vested in the surviving spouse.

544 P.2d at 298 (citation omitted).

60. 77 Idaho 373, 292 P.2d 760 (1956).

61. The court stated:

We hold only that when a insurance policy is issued on the life of a married person without the knowledge or consent of the other spouse and (1) someone other than the insured's spouse is the named beneficiary; and (2) no consideration passes between the insured and the named beneficiary; and (3) the premiums are paid with community assets; and (4) the insured dies; a community property interest exists as to one-half of the proceeds of the policy.

544 P.2d at 298. Although the language of the last phrase seems to indicate that only one-half the proceeds are community property, in order to be consistent with the rest of the opinion the last phrase should read: "a community property interest of the surviving spouse exists as to one-half of the proceeds of the policy." Whatever the language intended, however, the holding is that a spouse can make a gift of one-half the proceeds of a community property life insurance policy.

In holding that the risk payment doctrine was applicable to term insurance and that an insured spouse can give away only one-half of community property proceeds without the consent of the noninsured spouse, the court resolved the policy questions that it had considered to be important. The surviving spouse is protected because he or she is entitled to one-half the proceeds of the policy. In addition, the wish of the insured spouse to make provision for dependent relatives can be fulfilled to the extent of the other half of the proceeds. The court reasoned that there was no reason to prohibit a spouse "from giving away an amount which can be no more than half of property accumulated during marriage through the medium of life insurance when we permit him to do so through the law of descent and distribution."<sup>62</sup>

*Johnson* was a well-reasoned case and was the first opinion in which a court fully considered both the legal and policy considerations associated with the risk payment doctrine and its alternatives.<sup>63</sup> When other state courts consider the risk payment doctrine, they should follow the lead of the *Johnson* court and examine the same legal and policy questions before making their decision.

### E. New Mexico

The most recent acceptance of the risk payment doctrine was by the New Mexico Supreme Court in the decision of *Phillips v. Well-born*.<sup>64</sup> Previously, the court had accepted the inception of title rule and applied it in two instances in which premiums had been paid from both separate and community funds.<sup>65</sup> In neither of the previous cases, however, had the court explicitly stated whether the policy under consideration was a cash value or a term policy.<sup>66</sup>

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62. *Id.*

63. Although undoubtedly influenced by the two 1968 Arizona Court of Appeals cases in which Arizona accepted the risk payment doctrine, the Idaho Supreme Court seemed to be striking out on its own, for it cited only one of the two Arizona cases, *Gaethje v. Gaethje*, 7 Ariz. App. 544, 441 P.2d 579 (1968). Additionally, that Arizona case was cited only for the narrow proposition that a term policy has no value except at death. It was the Idaho court's own conclusion that the risk payment doctrine is the most sensible approach to take when dealing with term insurance.

64. 552 P.2d 471 (N.M. 1976).

65. *Hickson v. Herrmann*, 77 N.M. 683, 427 P.2d 36 (1967) (premium payments on a child's policy made from community funds during marriage and separate funds after divorce); *In re White's Estate*, 43 N.M. 202, 89 P.2d 36 (1939) (premium payments on the husband's U.S. government policy made from separate funds while single and community funds after marriage).

66. The United States government policy in *White* would have been a one-year renewable and convertible term policy unless it had been converted to a cash value

In *Phillips*, the insured husband took out two term life insurance policies during his first marriage, paying premiums on them with community funds for six years on one policy and two years on the other. After a divorce from his first wife, in which neither of the policies was specifically awarded to either party, the insured was single for over a year before marrying his second wife. Eighteen months after his second marriage the insured died. Presumably the sources of premium payments were separate funds when he was single and community funds during his second marriage. After the insured's death, the second wife sought declaratory relief against the beneficiaries under the policies and against the insured's first wife in order to determine the ownership of the proceeds of the policies. The trial court awarded all proceeds to the beneficiaries.

The first wife appealed the trial court's decision, contending that she had a one-half interest in each policy as a tenant in common with the insured for two reasons.<sup>67</sup> The first was the statutory provision that "[t]he failure to divide the property on dissolution of marriage shall not affect the property rights of either the husband or wife . . . ."<sup>68</sup> She also argued that the court should follow its previously accepted rule that life insurance policies purchased with community funds and which are undisposed in the divorce decree are owned by the former spouses as tenants in common after the divorce.<sup>69</sup> The beneficiaries of the policies, the insured's parents, argued that they

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policy. See Act of Oct. 6, 1917, ch. 105, § 2, 40 Stat. 398. Eleven years after *White* the United States Supreme Court held that proceeds of a military life insurance policy similar to the policy in *White* are the insured spouse's separate property even if all premiums have been paid from community funds. *Wissner v. Wissner*, 338 U.S. 655 (1950). See also Rev. Rul. 56-603, 1956-2 CUM. BULL. 601. *Wissner* may thus give the New Mexico Supreme Court a reason for distinguishing the *White* facts from a future case that may come before it.

The policy in *Hickson* was probably a cash value policy because the husband testified that one reason he volunteered to maintain the child's policy after divorce was so the policy could be used for the child's education. 427 P.2d at 38. A term policy would build up little or no cash value that could be used for the child's education. At the time of divorce in *Hickson*, however, the policy had not yet begun to accumulate cash value. *Id.* In any event, the court in *Phillips* stated: "If *Hickson v. Herrmann* did deal with term insurance, which cannot be ascertained from the facts, it is overruled to the extent described herein." 552 P.2d at 473 n.1.

67. The original action involved determining the ownership of four life insurance policies, including the two term policies. The only question raised on appeal was whether the first wife had any interest in the term policies. 552 P.2d at 472. The court was not presented with the issue of determining the extent of the surviving spouse's ability to void the transfer of community property proceeds otherwise payable to a third party as policy beneficiary.

68. N.M. STAT. ANN. § 22-7-22 (Supp. 1975).

69. 552 P.2d at 472.

should be entitled to the proceeds because (1) term life insurance is not property but a contingent contractual right, (2) it would be inequitable for a former wife to make a claim against insurance proceeds when she had made none during the divorce and made no subsequent premium payments, and (3) due to the unique nature of term insurance, previous premium payments made during a former marriage do not necessarily make the term life insurance policies community property after divorce.

In its analysis, the court first distinguished the previous cases which had held that community property life insurance policies not disposed of in the divorce decree are owned by the former spouses as tenants in common because those cases had dealt with cash value insurance rather than term insurance.<sup>70</sup> The court then explained the nature of term insurance, stating that it had no cash surrender value and that the policy could be terminated at any time by merely refusing to make premium payments. Finally, the court concluded that when a term life insurance policy is undisposed in the divorce decree, the former spouses hold the policy as tenants in common only until the end of the period for which the last community premium was paid.<sup>71</sup>

The *Phillips* case is thus somewhat similar to the Arizona Court of Appeals decision of *Lock v. Lock*.<sup>72</sup> Both cases involved a former wife suing for partition of the proceeds of a term insurance policy on the

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70. *Id.* at 472–73. The prior cases which were distinguished are *Harris v. Harris*, 83 N.M. 441, 493 P.2d 407 (1972), and *Hickson v. Herrmann*, 77 N.M. 683, 427 P.2d 36 (1967).

71. The court stated:

Unless otherwise ordered by the court in the dissolution of marriage and the property settlement, the divorced spouses have an equal interest as tenants in common in a term life insurance policy until such time as the term determined by the last premium paid by community funds comes to an end. Here, [the insured's term life insurance] policies were paid in quarterly installments. Thus, [the first wife's] interest in those policies terminated on the date where the quarter ended for which the premium payment had been made prior to the dissolution of the marriage. When [the insured] died, [the first wife's] interest in the policies had long since ended. To hold otherwise could result in manifest injustice. For example, if we were to adopt [the first wife's] position, a wife of short duration could theoretically assert her interest against her ex-husband's estate twenty or more years later merely because the policy was taken out during their marriage and one premium was paid with community funds. Further complexities would arise should the husband in this hypothetical example have remarried once or twice before his death. The test formulated above obviates such problems.

552 P.2d at 473 (footnotes omitted). Thus the supreme court accepted the second and third arguments of the beneficiaries. Coincidentally, the same reasoning and result were suggested by a commentator several months prior to the *Phillips* decision. Comment, *supra* note 2, at 380 n.116.

72. See notes 47–49 and accompanying text *supra*.

ex-husband's life under the theory that the policy was held by the former spouses as tenants in common after a divorce in which the policy was undisposed. One difference between the two courts' reasoning, however, is that the analysis of the court in *Phillips* was much more sophisticated. In *Lock*, the court merely asserted that because post-divorce funds paid for all of the coverage that was in effect at the former husband's death, the previous community had no interest in the proceeds. In *Phillips*, however, the court actually indicated the moment at which the community interest ended. It said that if the policy is undisposed in the divorce decree and if no premiums are paid after divorce, then the former spouses would have a common interest in the proceeds if the insured spouse died before the end of the period for which a payment had been made, plus any applicable grace period.<sup>73</sup> Once a subsequent premium is paid with separate funds after divorce, however, the former community has no interest in the proceeds. This rather sophisticated analysis and the willingness of the New Mexico Supreme Court to establish a rule broader than that required by the facts of the case indicate the court's confidence in the viability of the risk payment doctrine.

As a result of *Phillips*, it can be expected that when New Mexico courts face the question of the characterization of term life insurance proceeds where separate funds have paid for premiums before marriage and community funds during marriage and the insured dies during marriage, the proceeds will be held to be community property. It is unknown, however, how much of the community proceeds could be given to a nonspouse beneficiary who is designated without the consent of both spouses. Although a New Mexico statute<sup>74</sup> on its face

73. The court stated: "If [the insured] had not continued paying his premiums, [the first wife's] interest would have continued through the policy's 31 day grace period." 552 P.2d at 473 n.4.

74. The pertinent part of the statute reads:

A. Except as provided in subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one [1] spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.

N.M. STAT. ANN. § 57-4A-8 (Supp. 1975).

## Community Property Life Insurance

seems to allow such a gift, it may be judicially limited in a manner similar to the methods in which the Texas,<sup>75</sup> Arizona<sup>76</sup> or Idaho<sup>77</sup> courts have limited gifts of community property life insurance proceeds.

### F. California, Washington and Nevada

Although the risk payment doctrine has not been adopted in three community property jurisdictions, it may yet be. The apportionment rule has been accepted as the law of California since 1931,<sup>78</sup> but the question of its applicability has never been presented to the state supreme court. The doctrine originated and has developed exclusively in the lower state courts.<sup>79</sup> Thus, although the apportionment rule has been applied to term insurance by the intermediate appellate courts and the risk payment doctrine has been rejected,<sup>80</sup> it is unknown whether the California Supreme Court would accept the risk payment doctrine.

The Washington Supreme Court has applied the apportionment rule to both cash value<sup>81</sup> and term insurance<sup>82</sup> policies. In *Small v. Barty-*

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75. See note 40 *supra*.

76. See note 43 *supra*.

77. See notes 60-61 and accompanying text *supra*.

78. *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 P. 754 (1931) (premiums paid from separate funds before marriage and community funds after marriage).

79. See, e.g., *Polk v. Polk*, 228 Cal. App. 2d 763, 39 Cal. Rptr. 824 (1964) (group term policy premiums paid from community funds before abandonment and separate funds after abandonment); *Gettman v. City of Los Angeles*, 87 Cal. App. 2d 862, 197 P.2d 817 (1948) (employee death benefit plan premiums paid from funds of first community and separate funds before remarriage and funds of second community after remarriage); *McBride v. McBride*, 11 Cal. App. 2d 521, 54 P.2d 480 (1936) (premiums paid from funds of first community before divorce and second community after remarriage); *Estate of Webb*, Myr. Prob. 93 (Cal. 1875) (cash value policy premiums paid from separate funds before marriage and community funds after marriage).

80. See *Polk v. Polk*, 228 Cal. App. 2d 763, 39 Cal. Rptr. 824, 834-38 (1964) (discussion of applicability of apportionment rule to group term life insurance); *Gettman v. City of Los Angeles*, 87 Cal. App. 2d 862, 197 P.2d 817, 819 (1948) (discussion of applicability of apportionment rule to employee death benefit plan and rejection of risk payment doctrine); *McBride v. McBride*, 11 Cal. App. 2d 521, 54 P.2d 480, 481 (1936) (discussion of applicability of apportionment rule to assessment life insurance policy and rejection of risk payment doctrine); *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 P. 754, 754-55 (1931) (discussion of applicability of apportionment rule to mutual benefit certificate and rejection of risk payment doctrine).

81. See, e.g., *Wilson v. Wilson*, 35 Wn. 2d 364, 212 P.2d 1022 (1949) (cash value policy premiums paid from separate funds before marriage and community funds after marriage); *In re Coffey's Estate*, 195 Wash. 379, 81 P.2d 283 (1938) (policy

zel,<sup>83</sup> where the apportionment rule was first applied to term insurance, however, the spouse of the decedent argued the apportionment doctrine rather than the risk payment doctrine, for she was content with the characterization of 86% of the proceeds as community property through the application of the apportionment rule.<sup>84</sup> The dissenting chief justice argued that the risk payment doctrine should have been applied.<sup>85</sup> Since *Small*, the risk payment doctrine has been argued, but not accepted, in two subsequent cases.<sup>86</sup>

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premiums paid from separate funds before marriage and community funds after marriage).

82. *Small v. Bartyzel*, 27 Wn. 2d 176, 177 P.2d 391 (1947) (group term insurance policy premiums paid from separate funds before marriage and community funds after marriage).

83. *Id.*

84. In *Small*, the plaintiff surviving spouse sued the beneficiary of the policy, the deceased spouse's child by a former marriage, for the community portion of the proceeds. Because 13 policy premiums had been paid before the decedent's marriage from his separate funds and 79 premiums had been paid during marriage from community funds, the trial court declared 79/92 (86%) of the proceeds to be community property. Before the Washington Supreme Court, the beneficiary argued for the application of the inception of title rule and the surviving spouse argued for the apportionment rule. See Brief for Appellant, *Small v. Bartyzel*, 27 Wn. 2d 176, 177 P.2d 391 (1947) and Brief for Respondent, *Small v. Bartyzel*, *supra*. The plaintiff surviving spouse mentioned the risk payment doctrine, which would allow recovery of the entire proceeds, only in a portion of one paragraph of her brief in order to indicate that she should be able to recover at least her proportionate interest in the group term policy proceeds. Brief for Respondent at 29-30, *Small v. Bartyzel*, *supra*.

85. Chief Justice Mallory concluded:

The full value for all the monthly premiums except the last one was received by way of the protection enjoyed by the assured during the periods for which they were paid . . . .

. . . Hence, no premium has any significance except the last premium, which was paid during coverture, and for this reason the avails of the policy are community property.

*Small v. Bartyzel*, 27 Wn. 2d 176, 185, 177 P.2d 391, 395-96 (1947) (dissenting opinion).

86. *Chase v. Chase*, 74 Wn. 2d 253, 444 P.2d 145 (1968); *Stephen v. Gallion*, 5 Wn. App. 747, 491 P.2d 238 (1971). It is apparent that the risk payment doctrine was argued in these cases only when one examines the briefs of counsel. See Brief for Appellant at 11-23, *Chase v. Chase*, *supra*; Brief for Respondent at 2-8, *Stephen v. Gallion*, *supra*. *Chase* involved a disability policy on which premiums had been paid for seven years during marriage. At the time the insured and his spouse were divorced, the insured was in the hospital as a result of heart trouble but did not realize he was permanently disabled and therefore entitled to benefits under a group disability insurance plan. Later, he was awarded a lump sum in settlement by the insurance company for his disability. Because the divorce decree had not mentioned the insurance policy, the court held that the former spouses held the policy and settlement obtained under the policy as tenants in common.

*Stephen* involved a group term life insurance policy on which monthly premiums had been paid for 15 years during marriage. The insured and his spouse then divorced on December 5, 1968 and the insured died slightly over a month later, on January 7, 1969. The divorce decree did not mention the policy. At least one monthly premium on the policy was paid after the divorce and before the insured's death. The court held that on the date of the husband's death, the policy was held by the former spouses

The Nevada Supreme Court has never faced the question of whether the inception of title, apportionment or risk payment rule should be applied when insurance premiums have been paid partly with separate funds and partly with community funds.

### III. THE RISK PAYMENT DOCTRINE AND ITS APPLICATION TO CASH VALUE INSURANCE: AN INTRODUCTION TO ITS POTENTIAL USE IN STATE COURTS

The risk payment doctrine should be applied to policies which have cash value as well as to term insurance policies. Cash value policies "may be considered to be a combination of decreasing term insurance (the pure protection element) and an increasing savings or investment element . . . ."<sup>87</sup> The risk payment doctrine should be applied to the risk or protection component of the cash value policy, while the cash value portion should be divided between the separate and community estates.<sup>88</sup> The division of the cash value can be based either on the

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as tenants in common and that therefore the former wife was entitled to recover one-half the policy proceeds from the sole beneficiary, the insured's minor daughter.

87. Williams, *Contracts—Whole Life and Endowment*, in *LIFE AND HEALTH INSURANCE HANDBOOK* 66, 70 (3d ed. D. Gregg & V. Lucas 1973). This concept is more fully developed in Comment, *supra* note 2 at 353–55, 381 and n.120.

88. The application of the risk payment rule to cash value insurance can easily be illustrated. Assume a single person purchased a \$10,000 nonparticipating whole life policy and paid five annual premiums before marriage and fifteen annual premiums after marriage. Upon the death of the insured 20 years after paying the first premium, the cash value may be \$2,000. If the cash value would be apportioned according to the nature of the property used to pay the premiums, one-fourth (5/20) would be characterized as separate property and three-fourths (15/20) would be characterized as community property. The risk portion of the policy, *i.e.*, the face value (\$10,000) less the cash value (\$2,000), \$8,000, would be characterized according to whether separate or community funds were used to pay the final premium. For a more detailed discussion of the risk payment doctrine and cash value insurance see Comment, *supra* note 2, at 381–88.

In 1895 the Canadian province of Quebec, which has the community property system, enacted a statute that required the risk payment rule to be applied to cash value life insurance policies in certain situations. An Act respecting Life Insurance, 58 Vict., c. 46, § 1 (Que. 1895). The statute provided that when a husband insured his life in favor of either his estate or his wife as beneficiary, if his wife predeceased him and "he survives longer than the year covered by the last premium payment made during the existence of the community," the community had a claim against the proceeds of the policy equal only to the amount of the cash value at the date of the wife's death. *Id.* A second provision provided that if, at the predeceasing wife's death, there was not yet any cash value in the policy but the policy later acquired a cash value, "then the husband or his estate shall account to the community only for the proportion represented by the premiums paid during the community." *Id.* Recently, the act in which this section was contained was replaced. An Act respecting insurance, ch. 70, § 438, [1974] Que. Stat. 683.



amount of premium payments made from separate and community funds<sup>89</sup> or on the increase in the cash value as a result of subsequent premium payments.<sup>90</sup>

The labels term or cash value should actually make no difference in the application of the risk payment doctrine because some term policies, such as level term to age 65, have cash value while some cash value policies, such as recently issued policies or those against which all the loan value has been borrowed, have no cash value.<sup>91</sup> The important consideration is the actual composition of the policy proceeds at the death of the insured, *i.e.*, the portion of the proceeds attributable to the cash value component and the portion attributable to the protection element.

As has been discussed, the Supreme Court of Louisiana has accepted the risk payment doctrine for use with disability insurance and has indicated that it would accept the same rule for use with term insurance.<sup>92</sup> Arizona and Texas courts have clearly adopted the risk payment doctrine for use with term insurance.<sup>93</sup> The courts of all three states have also accepted the concept that the community has a fractional interest in the cash value of a policy on which premiums have been paid with separate funds before marriage and community funds afterwards.<sup>94</sup> These concepts could easily be combined to form the risk payment doctrine for use with cash value policies. Presently all three jurisdictions use the inception of title rule for cash value policies.<sup>95</sup>

Idaho and New Mexico have most recently adopted the risk payment doctrine for use with term insurance.<sup>96</sup> The courts of these states have not yet adopted a method for characterizing the cash value of a

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89. Upon divorce, it has been held that the measure of separate and community interests in a cash value life insurance policy is determined by apportioning the cash value between the separate and community estates according to the amount of premiums paid from each source. *Pollock v. Pollock*, 7 Wn. App. 394, 403, 499 P.2d 231, 237 (1972); *Berdoll v. Berdoll*, 145 S.W.2d 227 (Tex. Civ. App. 1940. *writ dismissed*).

90. Upon death and divorce, the measure of the community interest in a separate policy has been held to be the increase in the cash value of the policy resulting from payments made with community funds. *T.L. James & Co. v. Montgomery*, 332 So. 2d 834, 847 (La. 1975) (death); *Connell v. Connell*, 331 So. 2d 4, 6-7 (La. 1976) (divorce); *Blaine v. Blaine*, 63 Ariz. 100, 159 P.2d 786, 790 (1945) (divorce).

91. For a more complete discussion of this point, see Comment, *supra* note 2, at 382-84.

92. See Part II-A *supra*.

93. See Parts II-B & II-C *supra*.

94. See notes 89 & 90 *supra*.

95. See notes 13, 38, 41, & 49 and accompanying text *supra*.

96. See Parts II-D & II-E *supra*.

policy when both separate and community funds have made premium payments. The cash value could be characterized as separate and community in proportion to the amount of premiums paid from each source. This is the method used by the courts of Washington and Texas,<sup>97</sup> and is similar to the manner in which Idaho and New Mexico courts characterize military retirement benefits.<sup>98</sup> It is also possible that the courts would accept the Louisiana and Arizona rule<sup>99</sup> of determining the community interest in a separate policy by the increase in the policy's cash value resulting from payments made from community funds.

Regardless of the precise manner in which the Idaho Supreme Court would split the cash value between the separate and community estates, however, there is no precedent hindering the immediate use of the risk payment doctrine for cash value insurance in Idaho as there is in Louisiana, Texas, Arizona, and New Mexico. This is because the Idaho Supreme Court has not yet faced the problem of separate and community interests in a cash value life insurance policy when both separate and community funds have paid premiums on such a policy. In fact, the reasoning and the holding in the *Johnson* case in which Idaho accepted the risk payment doctrine for use with term insurance may mandate the use of the risk payment doctrine with cash value insurance.<sup>100</sup>

#### IV. TRANSFER TAX CONSEQUENCES OF THE RISK PAYMENT DOCTRINE

##### A. *The Death of the Insured Spouse Before the Noninsured Spouse*

When an insured person dies leaving a surviving spouse, the use of the risk payment doctrine could result in a federal tax liability greater than, equal to, or less than the tax liability under the inception of title

97. See note 89 *supra*.

98. Military retirement benefits in Idaho and New Mexico are characterized as separate and community in proportion to the number of years of service prior to marriage (or after marriage but domiciled in a common law jurisdiction) and the number of years of service after marriage while domiciled in a community property jurisdiction. See *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969).

99. See note 90 and accompanying text *supra*.

100. For an analysis of the possibility of applying the risk payment doctrine to cash value policies in the remaining community property jurisdictions, see Comment, *supra* note 2, at 384-5.

or apportionment rules. There may be an increased tax burden under the application of the risk payment doctrine when the following conditions exist: (1) the insured is married at death; (2) policy premiums on insurance payable at the insured's death were begun before the current marriage or after the current marriage but before moving into a community property jurisdiction;<sup>101</sup> (3) the policy beneficiary is neither the surviving spouse nor the insured's estate, but a third party; and (4) the insured's estate includes property other than life insurance and the insured spouse's interest in such property passes to the surviving spouse.

As an example,<sup>102</sup> assume that a person paid premiums on a \$100,000 term life insurance policy for five years prior to marriage from separate funds and for 15 years after marriage from community funds. He then died in 1976, survived by a spouse and a child. In addition to the life insurance, the decedent owned only community property valued, for federal estate tax purposes, at \$100,000. The child was the beneficiary of the insurance policy and the surviving spouse was entitled to receive all of the decedent's interest in the other community property. The federal estate and gift taxes payable by reason of his death prior to 1977 are shown in the table on the opposite page.

The example indicates that when the beneficiary of the insurance policy is a third party, the estate tax advantage offered by the risk payment doctrine may be no greater than that available through the use of the marital deduction under either the inception of title or the apportionment rule. The risk payment doctrine may even result in a total tax burden greater than that under either of the other rules; be-

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101. Property acquired by a spouse as his or her separate property while the couple is domiciled in a common law jurisdiction is classified as that spouse's separate property when the couple moves to a community property jurisdiction. W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 91, at 223 (2d ed. 1971); H. MARSH, *MARITAL PROPERTY IN CONFLICT OF LAWS* 225-39 (1952). Thus, post-marriage premium payments made while the couple is living in a common law state are treated in the same manner as are pre-marriage premium payments made by an individual in a community property state. For federal estate tax purposes, California's quasi-community property statute, CAL. PROB. CODE § 201.5 (West 1956), does not alter the tax treatment of quasi-community property as the acquiring spouse's separate property.

102. Although recent modifications of the federal estate and gift tax law have raised the amount of the marital deduction and have, in effect, increased the estate tax exemption for decedents who die after December 31, 1976, the principles illustrated in the examples remain valid. See Tax Reform Act of 1976, Pub. L. No. 94-455, Tit. XX (Oct. 4, 1976). It can also be expected that pre-1977 federal estate tax law affecting life insurance will continue to be litigated in the appellate courts for the next decade. Finally, the examples may be useful in illustrating a result that may be analogous under state estate, inheritance and gift tax laws.

## Community Property Life Insurance

	<i>Inception of title doctrine</i>	<i>Apportionment doctrine<sup>103</sup></i>	<i>Risk payment doctrine</i>
Total assets of the community and the husband's separate estate	\$200,000	\$200,000	\$200,000
One-half of community property (excluding insurance) deemed to be owned by wife	(50,000)	(50,000)	(50,000)
Marital deduction <sup>104</sup>	(50,000)	(12,500)	—
Portion of insurance proceeds deemed to owned by wife <sup>105</sup>	—	(37,500)	(50,000)
Exemption	(60,000)	(60,000)	(60,000)
Taxable estate	\$ 40,000 <sup>106</sup>	\$ 40,000	\$ 40,000
Gift tax <sup>107</sup>	—	\$ 101.25	\$ 952.50
Estate tax	\$ 4,800	4,800	4,800
Total tax	\$ 4,800	\$ 4,901.25	\$ 5,752.50

103. This example follows the apportionment rule as adopted in California, whereby a spouse may dispose of his or her half interest in community life insurance proceeds through a beneficiary designation. *New York Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61 (1923). In Washington, the other state that has adopted the apportionment theory, however, an insured spouse cannot validly designate a beneficiary other than his wife or his estate without his wife's consent. *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27 (1937); *In re Towey's Estate*, 22 Wn. 2d 212, 155 P.2d 273 (1945). Thus the example in the text is applicable to Washington decedents only if the deceased spouse's estate is the beneficiary of the life insurance policy and if the decedent's will directs that at least half of the community interest in the policy proceeds go to one other than his spouse.

104. The amount of the pre-1977 marital deduction is the lesser of (1) the amount of property passing to the surviving spouse which qualifies for the marital deduction, or (2) one-half the adjusted gross estate. INT. REV. CODE OF 1954, § 2056(a), (c)(1). In this example the amount of qualifying property passing to the surviving spouse is \$50,000, which is the deceased husband's interest in the community property. The adjusted gross estate is the husband's gross estate minus the sum of the amount of community property in which he had an interest and a proportion of § 2053 and § 2054 deductions (\$0 in the example). Thus, the adjusted gross estate in this instance is the amount of separate property owned by the husband at death, or \$100,000, \$25,000

cause the risk payment doctrine results in the greatest amount of insurance proceeds being characterized as owned by the surviving spouse, the gift tax liability of the surviving spouse for proceeds passing to other beneficiaries will be the greatest.

The negative tax effect of the risk payment doctrine is ameliorated, however, by two additional factors. First, if the payment of the surviving spouse's share of insurance proceeds to the third party is voidable,<sup>108</sup> then she can claim the proceeds herself and thereby eliminate any gift tax liability. Alternatively, she could void the transfer for the

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and \$0 under the inception of title, apportionment and risk payment rules respectively.

105. If a cash value policy were involved, the portion of insurance proceeds deemed to be owned by the wife would be a combination of one-half the protection portion of the policy plus one-half of the community interest in the cash value.

106. A deduction from the insured's gross estate may be allowed for the community's claim of premium payments it made on the insured's separate policy. Under the facts of this example, however, the taxable estate would remain unchanged. This is so because the marital deduction, which would be reduced in the amount of one-half the community claim, would be exactly offset by the deduction from the gross estate for the debt to the surviving spouse of one-half the total community claim.

Whether the community claim may in all cases be deducted from the gross estate is not yet settled. The position of the Internal Revenue Service is that the deduction of the claim against the insured's estate for reimbursement of premiums paid from community funds should be allowed only if the claim is presented to and actually paid by the insured's estate. Rev. Rul. 232, 1953-2 CUM. BULL. 268, 272 Example (E). The Tax Court, however, has held that when the surviving spouse is the sole beneficiary, the claim need not be actually presented to and paid by the insured's estate in order to be deductible. Estate of Bryan Wildenthal, 29 CCH Tax Ct. Mem. 519 (1970).

The amount of the community claim is determined by state law. Such claim was formerly the reimbursement of premiums paid from community funds. See Rev. Rul. 232 *supra*. Recently, however, the Louisiana Supreme Court held that such a reimbursement of premiums is incorrect and the correct principle is that the community should be reimbursed in an amount equal to the increase in the policy's cash value during the time the community was paying premiums. T.L. James & Co. v. Montgomery, 332 So. 2d 834, 847 (La. 1975). Thus there would be no reimbursement available in Louisiana where community funds have paid premiums on a separately-owned term policy. In a cash value policy the increase in cash value by reason of community premium payments may be, depending on the circumstances, greater or lesser than the former measure of the amount of premiums paid from community funds.

107. Any portion of community property proceeds deemed to be owned by the surviving spouse which is received by a third party as beneficiary is subject to gift taxation. Treas. Reg. 25.2511-1(h)(9) (1958); Rev. Rul. 232, 1953-2 CUM. BULL. 268, 270-72 Examples (A)(1) & (D)(1) (Louisiana law); Rev. Rul. 48, 1948, 1953-1 CUM. BULL. 392 (Texas and Louisiana law). In this example, it is assumed that the \$3,000 annual exclusion and the pre-1977 \$30,000 lifetime exemption are fully available. See note 109 *infra*.

108. For a summary of the laws in the various community property jurisdictions relating to the ability of the wife to set aside the beneficiary designation of a community life insurance policy see notes 23, 40, 43 & 103 *supra* (Louisiana, Texas, Arizona, California and Washington), notes 60, 61 & 74 and accompanying text *supra* (Idaho and New Mexico), and Christensen v. Christensen, 530 P.2d 754 (Nev. 1975) (Nevada). See generally Travelers Ins. Co. v. Johnson, 97 Idaho 336, 544 P.2d 294, 297-98 (1975); W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 123 (2d ed. 1971).

## Community Property Life Insurance

amount in excess of the applicable gift tax exemption and exclusions and during the following years give additional amounts (up to her annual exclusion of \$3,000 per donee) until the entire amount of the surviving spouse's half interest in the policy proceeds had been given to the beneficiary.<sup>109</sup> Second, if the gift is not voided and the beneficiary does receive all the policy proceeds, only the amount in excess of the annual \$3,000 per donee gift tax exclusion and the available amount of the surviving spouse's lifetime exemption will be subject to gift tax.<sup>110</sup>

There are situations, however, in which the application of the risk payment doctrine will save taxes. If the following conditions are met the tax burden at the decedent's death *may* be less when the risk payment doctrine is used than when either of the alternative theories is employed: (1) the insured is married at death; (2) policy premiums on insurance payable at the insured's death were begun before the current marriage or after the current marriage but before moving into a community property jurisdiction;<sup>111</sup> (3) the policy beneficiary is neither the surviving spouse nor the insured's estate, but a third party; and (4) the amount of life insurance payable on the insured's death and included in his gross estate is greater than his non-insurance assets.

As an example, assume that a person obtained a \$100,000 group term life insurance policy when he began employment and worked for his employer for four years while single and one year while married. He then died in 1976, survived by his wife and his mother. In addition to his life insurance, there was other separate property valued at

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109. The annual gift tax exclusion allows an individual to make gifts of \$3,000 or less per donee without incurring gift tax liability. INT. REV. CODE OF 1954, § 2503(b). In addition, under pre-1977 law each individual is allowed a lifetime exemption of \$30,000 which may be applied against gifts in excess of \$3,000 per donee per year. INT. REV. CODE OF 1954, § 2521. Thus, it would be possible for the surviving spouse to pay no gift tax if she voided the transfer of her portion of the proceeds to the beneficiary and then gave the beneficiary \$33,000 at once, followed by \$3,000 per year until the entire amount of the surviving spouse's half of the policy proceeds had been given to the beneficiary. If there were more than one beneficiary, the maximum amount of a gift which would be exempt from gift tax during the first year would be, in addition to the \$30,000 lifetime exclusion, \$3,000 per beneficiary. In each succeeding year the surviving spouse could give \$3,000 to each beneficiary without incurring gift tax liability. Effective January 1, 1977, a unified estate and gift tax credit replaced the \$30,000 gift tax exemption. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001 (Oct. 4, 1976).

110. Thus, under pre-1977 law, if there were four beneficiaries the total excluded from the amount of the taxable gift would be \$42,000. See note 109 *supra*.

111. See note 101 *supra*.

\$20,000 and community property valued at \$10,000. The decedent's mother was the beneficiary of the insurance policy and his surviving spouse was entitled to receive all of his other property. A summary of the calculations of the decedent's taxable estate and the total federal estate and gift tax burden under the various doctrines is as follows:

	<i>Inception of title doctrine</i>	<i>Apportionment doctrine<sup>112</sup></i>	<i>Risk payment doctrine</i>
Total assets of the community and the husband's separate estate	\$130,000	\$130,000	\$130,000
One-half of community property (excluding insurance) deemed to be owned by wife	(5,000)	(5,000)	(5,000)
Marital deduction <sup>113</sup>	(25,000)	(25,000)	(10,000)
Portion of insurance proceeds deemed to be owned by wife <sup>114</sup>	—	(10,000)	(50,000)
Exemption	(60,000)	(60,000)	(60,000)
Taxable estate	\$ 40,000 <sup>115</sup>	\$ 30,000	\$ 5,000
Gift tax <sup>116</sup>	—	—	\$ 952.50
Estate tax	\$ 4,800	\$ 3,000	\$ 150.00
Total tax	\$ 4,800	\$ 3,000	\$ 1,102.50

112. See note 103 *supra*.

113. See note 104 *supra* for the definition and formula for calculation of the marital deduction. In this example, the amount of qualifying property passing to the surviving spouse is \$25,000, which consists of \$20,000 of separate property and \$5,000 of the husband's interest in community property. The amount of the adjusted gross estate is the total amount of the husband's separate property, which is \$120,000, \$100,000 and \$20,000 under the inception of title, apportionment and risk payment rules respectively.

114. See note 105 *supra*.

115. See note 106 *supra*.

116. See note 107 *supra*.

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Under these circumstances, the risk payment doctrine results in the smallest taxable estate and lowest total tax liability. Although there is a taxable gift from the wife if the beneficiary receives the portion of the proceeds deemed to be owned by the wife, the total federal estate and gift tax burden under the risk payment doctrine is still significantly less than the federal estate tax under either of the other two rules.<sup>117</sup> Furthermore, the gift tax liability can be entirely eliminated by spreading the distribution of the surviving spouse's portion of the proceeds over several years.<sup>118</sup>

In the first example above, if the beneficiary of the policy were the surviving spouse rather than a third party, then there would be no difference among the tax results of the inception of title, apportionment and risk payment rules because there would be no gift tax. In the second example, an additional reason for there being no difference is the increase in the marital deduction<sup>119</sup> resulting from the receipt of the proceeds by the surviving spouse. In both examples, if the beneficiary were the insured's estate, whether there would be any difference among the tax consequences of the three rules would depend on how much of the estate passed to the surviving spouse and whether the surviving spouse claimed her one-half interest in community insurance proceeds.

### *B. The Death of the Insured Spouse After the Noninsured Spouse*<sup>120</sup>

The risk payment doctrine is also applicable to federal estate tax problems concerning the amount of community-owned life insurance

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117. This is so for two reasons. First, the pre-1977 gift tax rates were three-fourths the estate tax rates. Second, the amount of taxable gift in this example (\$17,000) is significantly less than the difference between the total taxable estate calculated under the risk payment doctrine and that calculated under either of the other two rules.

118. See note 109 and accompanying text *supra*.

119. The pre-1977 marital deduction would be increased to \$60,000 under the inception of title rule, \$50,000 under the apportionment rule, and would remain the same under the risk payment rule. For the definition and formula for calculation of the marital deduction, see note 104 *supra*. The amount of qualifying property passing to the surviving spouse under the inception of title rule would be \$125,000 and the adjusted gross estate would be \$120,000. Under the apportionment rule the amount of qualifying property passing to the surviving spouse would be \$115,000 and the adjusted gross estate would be \$100,000. Under the risk payment doctrine the amount of qualifying property passing to the surviving spouse would be \$75,000 but the adjusted gross estate would remain at \$20,000.

120. An analogous situation is when an insured ex-spouse dies after divorce and the policy was not included in the divorce decree.



proceeds that should be included in the gross estate of an insured spouse who dies after the noninsured spouse.<sup>121</sup> Because the successors in interest of the noninsured spouse receive a one-half ownership in the term policy upon that spouse's death, that interest should be treated as a life insurance policy of half the size.<sup>122</sup> If so treated, the noninsured spouse's successors must contribute premiums in order to keep their one-half of the policy in force. If they do so and the surviving spouse also continues to contribute premiums, then, upon death of the surviving spouse, one-half the proceeds will be characterized as owned by the successors and one-half by the surviving spouse.<sup>123</sup>

If the successors in interest of the deceased noninsured spouse do not contribute one-half of the premiums necessary to keep the policy in force, their half of the policy should be treated as having lapsed. The interest of the surviving spouse, who is then required to pay all subsequent premiums himself, would be the full face amount of the policy. The entire proceeds of the term insurance policy would then be includable in his gross estate at his death.<sup>124</sup> Alternatively, if the successors of the deceased spouse had been precluded from paying half of the premiums by a wrongful act of the surviving spouse, their recovery should be one-half of the policy's face value less one-half of the premiums paid by the surviving spouse until his or her death. Or instead of using the above rules, the court could, regardless of the intent of the successors in interest or of the wrongful acts of the surviving spouse, limit the recovery of the noninsured spouse's successors

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121. This discussion is not affected by the recent changes in the federal estate and gift tax law. See Tax Reform Act of 1976, Pub. L. No. 94-455, Tit. XX (Oct. 4, 1976). Although it can be expected that the frequency of the problem herein discussed will be lessened because of the higher exemptions under the new law, it can also be expected that the litigated battles will be hard fought because the marginal tax rate on the proceeds subjected to taxation will be at least 30%. *Id.* at § 2001.

122. If requested, an insurance company will actually divide one policy into two, each with one-half the face amount of the original. See Thurman, *Federal Estate and Gift Taxation of Community Property*, 1 ARIZ. L. REV. 253, 273 (1959).

123. If, however, the premium payments by the noninsured spouse's successors are deemed to be gifts to the surviving spouse, then the entire proceeds would be includable in the surviving spouse's gross estate at his death. This is because all premium payments subsequent to the death of the noninsured spouse would then be deemed to be from the surviving spouse's separate funds. In *Scott v. Commissioner*, 374 F.2d 154, 161 (9th Cir. 1962), premium payments made by the pre-deceasing noninsured spouse's legatees on community cash value policies were characterized by the Commissioner as loans to the surviving spouse. Such characterization apparently was not resisted by the taxpayer. *Id.*

124. If, however, the premium payments by the surviving spouse are deemed to be gifts to the noninsured spouse's successors, then only one-half of the proceeds will be includable in the surviving spouse's gross estate at his death.

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to one-half the face value less half the premiums subsequently paid by the insured surviving spouse. Such premium amounts should be cumulated at a reasonable rate of interest, such as nine or ten percent. This rule would treat the premium payment by the surviving spouse as a loan to the successors of the predeceasing noninsured spouse, yet recognize that each premium payment pays for the life insurance protection for a limited length of time.

If a cash value policy is involved, only a minor modification in the above rules is necessary. If the successors in interest of the noninsured spouse do not contribute one-half of the premiums necessary to keep the policy in force, and their half is treated as having lapsed, the successors should be entitled to one-half the former community interest in the policy's cash value. Thus the policy's face value less the interest of the deceased spouse's successors, which would be one-half the interpolated terminal reserve value of the policy at the death of the first spouse, is the amount that would be characterized as the insured's separate property and included in his gross estate at his death.

### *Revenue Ruling 75-100 and Scott v. Commissioner*

There has been one revenue ruling, Revenue Ruling 75-100,<sup>125</sup> and one case, *Scott v. Commissioner*,<sup>126</sup> concerning the extent of the insured spouse's interest in the policy proceeds when the insured spouse survives the noninsured spouse. The facts in the revenue ruling and *Scott* differ in that in the former, the insured spouse's death occurred shortly after the noninsured spouse's death. In the latter, the insured spouse's death occurred over a year after the death of the noninsured spouse. In Revenue Ruling 75-100, the husband and wife, both residents of Texas, owned a community property ordinary (cash value) life insurance policy on the husband's life which designated their children as beneficiaries. The wife predeceased her husband by ten days. Her estate was bequeathed to the children and there was no settlement of her interest in the policy prior to the husband's death. The Internal Revenue Service determined that the amount includable in the husband's gross estate was one-half the value of the proceeds. The amount includable in the wife's gross estate was one-half the

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125. 1975-1 CUM. BULL. 303.

126. 374 F.2d 154 (9th Cir. 1967).

value of the policy as determined by the terminal-reserve method under Treasury Regulation § 20.2031-8(a)(2).<sup>127</sup> The result under the risk payment doctrine would be the same under these facts and under any set of facts in which the subsequent death of the insured spouse occurred while the policy was still in effect and no premium payments had been made subsequent to the noninsured spouse's death.

In *Scott v. Commissioner*, the noninsured wife died in 1957, passing her interest in ten community property life insurance policies, which insured the husband's life, to two sons as her legatees. One-half the value of the policies was included in her gross estate. Thirteen months after the wife's death, the insured husband died. The sons, as beneficiaries under the policies, received all the insurance proceeds. During the 13 months between the wife's death and the husband's death, the husband paid almost 41% of the premiums due on the policies and the sons paid over 59% of the premiums. Because it was determined that the payment of the premiums by the sons was a gift to the husband, all premiums paid after the wife's death were deemed paid by the husband from his separate funds. The issue was how much of the life insurance policy proceeds were includable in the decedent husband's gross estate.

The Commissioner argued for the conclusion that the amount includable in the decedent's gross estate was the policies' total proceeds minus one-half the cash surrender value<sup>128</sup> of the policies at the wife's death. He contended that the wife's only interest in the policies was one-half the cash surrender value, and therefore all other policy rights, including that to receive the proceeds, were owned by the deceased husband. The Commissioner relied on the risk payment doctrine as applicable to cash value insurance to support this contention.<sup>129</sup> The decedent's estate argued that, because the California ap-

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127. The pertinent part of the regulation reads as follows:

[W]hen, at the date of the decedent's death, the contract has been in force for some time and further premium payments are to be made, the value may be approximated by adding to the interpolated terminal reserve at the date of the decedent's death the proportionate part of the gross premium last paid before the date of the decedent's death which covers the period extending beyond that date.

Treas. Reg. § 20.2031-8(a)(2) (1958).

128. It was not until later that the value of the predeceasing noninsured spouse's interest in such a policy was determined to be one-half the interpolated terminal reserve value rather than one-half the cash surrender value. Rev. Rul. 75-100, 1975-1 CUM. BULL. 303.

129. The court summarized the Commissioner's risk payment argument as follows:

portionment rule required the proceeds of the ten policies to be characterized as separate or community in proportion to the number of premium payments made from each source, the amount includable in the husband's gross estate was one-half the proceeds attributable to community property payments and all of the proceeds attributable to his separate property payments made after the wife's death. The court of appeals reversed the Tax Court,<sup>130</sup> which had held for the Commissioner, and accepted the reasoning and result argued by the decedent's estate.

The major factor that the court relied on in accepting the taxpayer's view was that such view was consistent with the California apportionment doctrine.<sup>131</sup> Presumably, if the risk payment doctrine had been accepted by the state rather than the apportionment rule, then the risk payment analysis proposed by the Commissioner would have been accepted,<sup>132</sup> for the court relied on the proposition that "state property rules control the estate taxation of community property life insurance."<sup>133</sup>

## V. CONCLUSION

Only the risk payment doctrine recognizes that life insurance is a series of unilateral contracts and that it may consist of both temporary and permanent elements. Because the risk payment doctrine is the

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[T]he right to receive the face amount of the policies upon the husband's death . . . is kept alive only by payment of further premiums by the husband after the wife's death. Consequently to the extent that the proceeds receivable at the husband's death exceed the cash surrender value at the wife's death, this is attributable to those premiums, which were not paid from community property, the marital community having been dissolved by the death of the wife.

374 F.2d at 159.

130. The Tax Court opinion is reported at 43 T.C. 920 (1965) and noted in Note, 64 MICH. L. REV. 1150 (1966).

131. See note 103 *supra*.

132. The court stated:

If the Commissioner's theory were correct, one would expect the courts to have held that the entire proceeds of the policies, less the cash surrender value, if any, at the date of the marriage, was community property, the husband's separate property interest being limited to that cash surrender value. But the courts of California have not so held.

374 F.2d at 159.

133. 374 F.2d at 157, quoting Thurman, *supra* note 8. Perhaps another factor that contributed to the Commissioner's losing in *Scott* was that the government presented the risk payment doctrine poorly. Although the court mentioned that the risk payment doctrine was more fully developed by the government during oral argument, the Commissioner's 25-page brief only devoted one paragraph to it. See Brief for Respondent at 20, *Scott v. Commissioner*, 374 F.2d 154 (9th Cir. 1967).

only rule that treats life insurance as this unique type of property, it is superior to both the inception of title and the apportionment rules. As courts have become aware of the nature of life insurance they have accepted the risk payment doctrine. During the past year alone, the supreme courts of Idaho and New Mexico have applied it to term insurance. It is predicted that in the future its acceptance by state courts will continue. It should also be remembered that not only have the state community property laws of Louisiana, Texas, Idaho, Arizona, and New Mexico been affected by the acceptance of the risk payment doctrine, but that the impact of the federal and state estate, inheritance and gift tax laws in those jurisdictions has been modified as well.

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